

**STATE OF VERMONT
GREEN MOUNTAIN CARE BOARD**

**IN RE: PROPOSED PURCHASE OF
BIRCHWOOD TERRACE**

) **GMCB 014-17con**
)

**APPLICANTS' RESPONSES TO THE GREEN MOUNTAIN CARE BOARD'S
JANUARY 9, 2018 REQUESTS FOR INFORMATION REGARDING FACILITY
CONSULTING AGREEMENT**

NOW COME the Applicants and submit the following responses to the January 9, 2018 requests for information from the Green Mountain Care Board (the "Board").

1. Provide a table that includes:

- (a) a complete list of the specific services and oversight responsibilities (Services), including day-to-day, fiscal and clinical, provided by Kindred, and those to be provided by Birchwood through the proposed Agreement;**
- (b) identify whether any of the Services and/or related costs are duplicative;**
- (c) identify which, if any, of the Services and related costs will be eliminated;**
- (d) identify whether each Service will be reimbursed by Medicaid;**
- (e) if not, provide a detailed explanation how the costs will be paid for.**

RESPONSE:

- (a) Kindred is and will continue to be responsible to provide all day-to-day, fiscal and clinical services necessary to operate the Birchwood Terrace Nursing Facility (the "Facility"). Specifically, Kindred will remain the licensed operator of the Facility and will maintain its existing licenses, provider numbers and accreditations, tax identifications number, insurance policies and will continue to furnish its residents with all the services it is currently furnishing. The Facility's administrator and staff will all remain in place as employees of the Facility. Kindred's corporate office will also continue to provide all administrative and back-office services to the Facility.

Kindred had been providing an additional level of oversight via its corporate team. Specifically, Kindred's corporate regional team supported the Facility with any questions or concerns regarding the fiscal or clinical operations of the Facility.

Pursuant to the Consulting Agreement between the parties, the Applicants will now act as a consultant advising and supporting the Facility, subject to the ultimate authority of Kindred.

KINDRED PROVIDED SERVICES	APPLICANTS PROVIDED SERVICES
Kindred will remain responsible to provide all day-to-day fiscal (Accounting and Accounts Payable, Billing and Accounts Receivable, Payroll and Employee Benefits, Information Technology, Cash Management, Income Taxes, Purchasing, Human Resources, Reimbursement, and Insurance) and clinical services necessary to operate the Facility.	Applicants responsible to advise and support Kindred's operation of the Facility, subject to the ultimate control of Kindred.

(b) None.

(c) On the Facility level, no service is being eliminated. On a corporate level, however, Kindred currently provides the Facility with access to certain members of their Corporate Clinical team who assist the Facility Administration and staff on a weekly basis and/or as needed with regulatory guidance and leadership to ensure the Facility is successful and maintains the highest standards of clinical compliance. Pursuant to the Consulting Agreement, the Applicants will now provide such support to the Facility in place of Kindred.

(d) The Facility will be paying the Applicants a consulting fee for their services. The Applicants do not believe facility incurred consulting fees are reimbursed through Medicaid.

(e) Kindred's current monthly management fee to the Facility will be reduced as Kindred will no longer be providing the Facility access to certain members of its corporate team.

2. Provide the signed Facility Consulting Agreement for review by the Board, including the costs associated with the Agreement.

RESPONSE:

A copy of the signed Consulting Agreement is attached hereto. The Applicants' monthly consulting fee under the Agreement is \$20,000.

3. Provide the name(s) of the individual(s) who will be responsible for each Service referenced in ¶ 1, above, and for each individual provide:

- (a) his or her past and current nursing home experience and title(s),
- (b) the number of years in each position;
- (c) whether s/he holds a current Nursing Home Administrator's license (if so, provide a copy),
- (d) whether s/he has previously held a Nursing Home Administrator's license, the State in which it was held, and the dates during which the license was in effect; and
- (e) a copy of each individual's curriculum vitae.

RESPONSE:

The individual Applicants will be responsible for providing the consulting services. Specifically, on a daily basis these services will be provided by Ari Erlichman, Isaac Rubin, Sharon Martin (Kindred's Northeast Regional Director of Clinical Operations including the Facility until December 1, 2017) and Thomas Depoy. Relevant nursing home experience for the foregoing individuals is set forth in the pending CON Narrative, and copies of their curriculum vitae are attached to the Narrative as well. Of the foregoing individuals, Thomas Depoy is a licensed nursing home administrator. As mentioned above, the current Facility administrator and staff will remain in place providing all the services the Facility is currently furnishing.

CONSULTING AGREEMENT

THIS CONSULTING AGREEMENT (this “**Agreement**”) dated as of February 1, 2018, is entered into by and between Kindred Nursing Centers East, L.L.C., a Delaware limited liability company (“**Operator**”), and Birchwood Operations LLC, a Vermont limited liability company (“**Consultant**” and together with Operator, each a “**Party**” and collectively, the “**Parties**”).

BACKGROUND

A. Operator is the duly licensed operator of the skilled nursing facility located at 43 Starr Farm Road, Burlington, Vermont 05408-1321 (the “**Facility**”).

B. Operator and Consultant (or their affiliates) are parties to a certain Operations Transfer Agreement dated as of June 30, 2017 (the “**Operations Transfer Agreement**”), pursuant to which the Parties anticipate Consultant will take over operations of the Facility after receiving regulatory approval.

C. In the interim, Operator desires to engage Consultant, effective as of February 1, 2017 (the “**Effective Date**”), to provide consulting services at the Facility on a contract basis for a monthly fee.

D. Consultant is willing to provide consulting services with respect to the Facility on the basis, terms and conditions set forth below.

NOW, THEREFORE, in consideration of the mutual representations, covenants and agreements herein contained and for other good and valuable consideration, the receipt and sufficiency of which is hereby mutually acknowledged, Consultant and Operator intending to be legally bound do hereby represent, covenant and agree as follows:

ARTICLE 1

OPERATING TERMS AND APPOINTMENT OF CONSULTANT AS CONSULTANT OF THE FACILITY

1.1 Appointment of Consultant. Operator hereby appoints Consultant, and Consultant agrees to act, as of the Effective Date, as a Consultant of the Facility to assist with and supervise the day-to-day business activities of the Facility, including all phases of its operations in the name of, on behalf of and for the account of Operator upon the terms and conditions hereinafter stated. Consultant shall assist Operator to obtain (as applicable), maintain, and preserve all necessary licenses, permits, approvals and accreditations to operate the Facility as a skilled nursing facility and services ancillary thereto (“**Primary Intended Use**”) so as to comply in all material respects with all applicable laws, rules and regulations (“**Applicable Law**”) and to be eligible for participation in all applicable Medicaid and Medicare programs, and any successor programs as and to the extent set forth in this Agreement.

1.2 Control Retained by Operator. Operator shall at all times retain and exercise control over, and shall have ultimate responsibility for the Facility, and Consultant shall perform the functions described in this Agreement to be performed by it in accordance with written policies and directives adopted by Operator or as otherwise set forth herein. Consultant shall provide its

services to the Facility pursuant to the terms of this Agreement and in a manner otherwise intended to comply with all pertinent provisions of Applicable Law. Whenever this Agreement calls for the approval of Operator, such approval shall be expressed in a writing as set forth under Section 6.6 hereof.

1.3 Services to Be Provided by Consultant. During the Term of this Agreement, Consultant shall, on behalf of Operator, and except as otherwise set forth herein, assist with and supervise all aspects of the day-to-day operations of the Facility and provide advice and support where necessary. Employees of one or more affiliates of Operator (such employees, the “**Back-Office Staff**”) shall perform certain back-office functions, which include, among other things, the services set forth on Schedule A hereto (“**Back-Office Services**”) for the Facility, and Consultant shall assist the Back-Office Staff in the performance of their functions as described herein. In connection therewith, Consultant’s responsibility for the day-to-day operation of the Facility will include, without limitation, the following actions:

(a) Assist Operator in selecting, supervising and training on behalf of Operator an adequate staff as required by Applicable Law, including the administrators and directors of nursing. Notwithstanding the foregoing, all employees at the Facility (excluding the Back-Office Staff, or any employees of Consultant, the “**Facility Employees**”) shall for all purposes, including but not limited to, the provision of fringe benefits as described below, be employees of Operator and carried on Operator’s payroll and shall not be deemed employees or agents of Consultant. Consultant shall be responsible for supervising and hiring the Facility Employees on behalf of Operator, subject in the case of hiring to the approval of Operator in its reasonable discretion. Consultant shall not terminate or take any other disciplinary action with respect to any of the Facility Employees unless approved in advance by Operator. Notwithstanding anything to the contrary contained herein, nothing shall obligate Operator or its affiliates to continuously employ the Back-Office Staff or Facility Employees during the Term of this Agreement;

(b) Assist Operator, at Operator’s expense and as approved by Operator in its reasonable discretion, with a program of regular maintenance and repair and maintain a maintenance log of all repairs, replacements or improvements made to the Facility;

(c) Provide advice and consultation to Operator with respect to the disbursement of funds for the orderly payment of accounts payable, employee payroll, taxes, insurance premiums and all expenses authorized by Operator;

(d) To the extent permitted by Applicable Law and subject to approval by Operator, assist Operator in implementing current rates and charges and instituting standards and procedures for admitting and discharging residents, for charging residents for services and for collecting the charges from residents or third parties;

(e) Propose revisions to policy manuals as are needed from time to time to assure, to Consultant’s knowledge, that the Facility complies with all Applicable Law in all material respects (provided that the foregoing does not constitute a guaranty of the same by Consultant);

(f) Assist and advise the Back-Office Staff in the handling and settlement of all employee relations matters, subject to approval by Operator;

(g) Assist in maintaining all licenses, certifications, permits and accreditations, all as required by Applicable Law for the operation of the Facility and all necessary or required contracts with third party payors and other similar governmental and non-governmental agencies and intermediaries;

(h) Assist the Back-Office Staff, subject to approval by Operator, in maintaining accounting and internal control systems, including suitable books and records of control and accounts as are necessary or required in order to comply in all material respects with Applicable Law;

(i) Assist in conducting promotional activities on behalf of the Facility in accordance with a marketing plan developed by Consultant, subject to approval by Operator, including media advertising and related marketing efforts, together with occasional on-site seasonal or promotional activities;

(j) Make recommendations concerning, and assist in the establishment and maintenance of, on a continuing basis, a quality assurance program; and

(k) For the purposes of this Agreement, "commercially reasonable efforts" shall mean such efforts as would be expended by a reasonably prudent person engaged in management of a nursing facility under similar circumstances.

1.4 Other Powers. The powers not specifically provided to Consultant in this Agreement shall remain with Operator.

1.5 Obligations of the Parties.

(a) In the event the term of this Agreement or the actions taken hereunder by Consultant or Operator, at any time, shall fail to comply with Applicable Law or maintain the quality of care currently provided at the Facility, such failure shall be cured as soon as practical by Consultant and/or Operator working together and, to the extent such failure requires the modification of this Agreement, Consultant and Operator agree to cooperate with each other to make such modifications to cause this Agreement to comply with Applicable Law.

(b) Each Party shall, within three (3) business days, provide to the other Party as and when received by such Party, all notices, reports or correspondence from governmental agencies and accrediting bodies that assert deficiencies or charges against the Facility or that otherwise relate to the suspension, revocation, or any other action adverse to any approval, authorization, certificate, termination, license, permit or accreditation required or necessary to own or operate the Facility. With Operator's prior approval, Consultant may assist the Operator with the appeal of any action taken by any governmental agency against the Facility, *provided that* such contest shall not result in the suspension of operations of such Facility.

1.6 Reserved.

1.7 Reserved.

1.8 Reports to Operator. Consultant shall:

(a) Assist the Back-Office Staff to prepare and deliver to Operator as soon as reasonably possible unaudited financial statements for the Facility covering the year to date and containing a balance sheet and statement of income and provide any assistance reasonably required by Operator in the preparation of financial statements for the operation of the Facility.

(b) Assist the Back-Office Staff to prepare and deliver to Operator as soon as reasonably practicable after the close of each month such other financial, clinical and statistical reports covering the prior month and fiscal year to date as may be reasonable requested by Operator to assess the performance of the Facility.

(c) Assist the Back-Office Staff to maintain a comprehensive system of office records, books and accounts in connection with its management and operation of the Facility in form reasonably satisfactory to Operator, which shall belong to Operator. Such books and records shall be kept in accordance with generally accepted accounting principles (“GAAP”).

(d) Provide Operator with copies of all licensure and/or certifications surveys conducted at the Facility applicable to Operator and any correspondence related thereto to the extent received by Consultant upon receipt or as soon as reasonably practical.

(e) Notify Operator of any reports of incidents made to the Department of Public Health or the Board of Registration in Medicine, prior to such reports being submitted to governmental authorities, if feasible, and otherwise as soon as reasonably practicable.

(f) Provide or work with the Back-Office Staff to provide Operator with monthly reports of the following items: new contracts and updates on amendments to or terminations of existing contracts, significant personnel changes, material changes to rates and charges, material collection actions, incident reports and other reports filed on behalf of the Facility, and disputes or litigation of any type.

(g) Provide or work with the Back-Office Staff to provide Operator with any other reports as may be reasonably required by Operator including, without limitation, any reports related to financial and compliance reporting and property condition.

1.9 Licenses, Permits and Certification.

(a) Consultant (to the extent within its control) and Operator shall each use commercially reasonable efforts to maintain all necessary licenses, permits, consents, approvals and certifications from all governmental agencies and accrediting bodies which have jurisdiction over the ownership and operation of the Facility (collectively, the “**Licenses**”).

(b) Consultant shall not take any action or fail to take any action which, to its knowledge, would cause any governmental authority having jurisdiction over the operation of the Facility to institute any proceeding for the denial, suspension, rescission or revocation of any necessary License. Consultant shall not take any action or fail to take any action in order to adversely affect the amount of, and Operator’s right to accept and obtain, payments under Medicare, Medicaid or any other public or private third party medical payment program.

(c) Consultant shall have the right, on behalf of Operator and with Operator's prior written approval, to contest by appropriate legal proceedings, diligently conducted in good faith in the name of Operator and at Operator's expense, the validity or application of any Applicable Law or requirement of any governmental agency having jurisdiction over the operation of the Facility. If Operator provides prior written consent, Operator shall cooperate with Consultant with regard to such contest.

(d) Consultant shall comply with Applicable Law in the performance of its duties hereunder.

1.10 Administrators and Directors of Nursing. Subject to Section 1.3(a), Consultant shall assist Operator in choosing qualified Administrators and Directors of Nursing. Consultant acknowledges and agrees that the current Administrator of the Facility shall remain in place for the Term of this Agreement.

1.11 Taxes. Consultant shall deliver to Operator a copy of any assessment, tax notice or tax bill relating to the Facility and received by Consultant and shall submit the same to the Back-Office Staff to pay the same out of the Facility revenues as and when due; *provided that* Consultant may direct the Back-Office Staff not to pay the same if (i) same is in good faith being contested by Operator, or by Consultant as is set forth below; (ii) enforcement thereof is stayed; and (iii) Operator shall have given Consultant written notice of such contest and stay and authorized and directed the nonpayment thereof, not less than five (5) days prior to the date on which such tax assessment, or charge is due and payable. Any federal, state or local taxes, assessments or other governmental charges imposed on the Facility are the obligations of Operator, not of Consultant. With Operator's prior approval, Consultant may contest the validity or amount of any such tax or imposition on the Facility. Consultant, on behalf of Operator, shall direct the Back-Office Staff to cause all Social Security and federal and state income tax withholding and other employee taxes which may be due and payable to be paid from the revenues of the Facility before the payment of any other operating expenses therefrom.

ARTICLE 2

OPERATING EXPENSES; CONSULTING FEE

2.1 Operating Expenses.

(a) Operator shall be responsible for the payment of each of the Facility's costs, expenses and cash disbursements of the Facility (including, without limitation, the payment of or reimbursement for salaries and fringe benefits and other benefits of all Facility Employees (whether hired by Operator or by Consultant on behalf of Operator, subject in either case to the approval by Operator in its reasonable discretion), taxes, capital improvements, rental payments, debt service (interest and principal) on existing indebtedness and expenses of operating, maintaining and repairing the Facility and funding necessary reserves (collectively, the "**Facility Expenses**"). All Facility Employees shall be treated solely as the employees of Operator for purposes of, and subject to the terms and conditions of, all fringe benefits and other benefit plans, programs and arrangements of Operator. The Facility Expenses of the Facility shall be paid from the revenues of such Facility or otherwise from the funds in such Facility's bank account. Consultant acknowledges and agrees that (i) Operator shall have the ability to direct and make the payment of any civil money penalty or require a refund or reimbursement for an overpayment to

Medicare, Medicaid, any other public or private third party medical payment program, or licensing agent (each a "**Repayment**"), and further, (ii) Consultant shall not make or initiate any Repayment without the prior written consent of Operator.

(b) As used herein, the term "fringe benefits" shall include, but not be limited to, the employer's contribution to FICA, employment compensation and other employment taxes, workmen's compensation, group life, accident, health, and disability insurance premiums, vacation, sick pay, and holidays.

(c) Affiliates of Operator shall be responsible for the payment of all of the Back-Office Staff's costs, expenses, and cash disbursements including, without limitation, the payment of salaries and fringe benefits, taxes, capital improvements, rental payments, and all other expenses incurred to provide the services provided by the Back-Office Staff (such expenses, collectively, the "**Staff Expenses**").

2.2 Consulting Fee. Except as otherwise provided herein, Consultant shall manage for the account of Operator and Operator shall pay to Consultant a monthly consulting fee of Twenty Thousand Dollars (\$20,000.00) (the "**Consulting Fee**"). On the last day of each month, Consultant shall deliver an invoice for the consulting services rendered that month to Operator (which shall be delivered to Raye Cole - Raye.Cole@kindred.com), and Operator shall pay Consultant the Consulting Fee no later than fifteen (15) days following the date Operator receives the invoice. If Consultant does not provide consulting services at the Facility for an entire month, then Consultant shall only be entitled to receive a pro rata amount of the Consulting Fee which shall be calculated based on the number of managed days in such month.

ARTICLE 3

TERM AND TERMINATION

3.1 Term. This Agreement shall commence on the Effective Date and shall continue through the Effective Time set forth in the Operations Transfer Agreement (the "**Term**"), unless otherwise terminated pursuant to the terms herein.

3.2 Termination by Operator.

(a) Notwithstanding anything else herein, Operator may terminate this Agreement upon the giving of seven (7) days' prior written notice to Consultant at any time without cause.

(b) Further, Operator may terminate this Agreement immediately upon the occurrence of any of the following events:

(i) A receiver, liquidator, or trustee of Consultant shall be appointed by court order, or a petition to liquidate or reorganize Operator under any bankruptcy, reorganization, or insolvency law has been filed and such petition is not vacated or dismissed within sixty (60) days, or Consultant shall file a petition in bankruptcy, or if Consultant shall make an assignment for the benefit of its creditors;

(ii) A material breach of this Agreement by Consultant which has not been cured within thirty (30) days after written notice thereof by Operator to Consultant;

(iii) If (A) any federal, state or local operating license, certification or approval required of Consultant to carry on its business or to execute the obligations of this Agreement (x) cannot be obtained, or (y) is at any time suspended, withdrawn, terminated or revoked, or (B) Consultant or any of its principals or executives are involuntary suspended, terminated or excluded from participation in the Medicare, Medicaid or any other public or private third party medical payment program; or

(iv) If Consultant has committed any act of embezzlement, fraud, larceny, or theft on or from Operator; or Consultant (or its officers, directors, consultants, agents, employees, or principals) is convicted of or enters a plea of guilty or nolo contendere for a felony that involves embezzlement, fraud, larceny or theft.

3.3 Termination by Consultant.

(a) Notwithstanding anything else herein, Consultant may terminate this Agreement upon the giving of sixty (60) days' prior written notice to Operator at any time without cause.

(b) Consultant may terminate this Agreement immediately upon the occurrence of any of the following events:

(i) A receiver, liquidator, or trustee of Operator shall be appointed by court order, or a petition to liquidate or reorganize Operator under any bankruptcy, reorganization, or insolvency law has been filed and such petition is not vacated or dismissed within sixty (60) days, or Operator shall file a petition in bankruptcy, or if an Operator shall make an assignment for the benefit of its creditors;

(ii) A material breach of this Agreement by Operator which has not been cured within thirty (30) days after written notice thereof by Consultant to Operator; or

(iii) If (A) any federal, state or local operating license, certification or approval required of Operator to carry on its business or to execute the obligations of this Agreement (x) cannot be obtained, or (y) is at any time suspended, withdrawn, terminated or revoked, or (B) Operator or any of its principals are involuntarily suspended or terminated from participation in the Medicare, Medicaid or any other public or private third party medical payment program.

3.4 Closing under Transfer Documents. This Agreement shall automatically terminate without further notice to or action by any Party upon the Effective Time set forth in the Operations Transfer Agreement.

3.5 Consultant's Obligations After Termination. Upon the expiration or termination of this Agreement, Consultant shall:

(a) Deliver to Operator, or such other person or persons designated by Operator, copies of all books and records of the Facility applicable to Operator in Consultant's possession and all funds in the possession of Consultant belonging to Operator or received by Consultant pursuant to the terms of this Agreement which are in Consultant's possession for or on behalf of

Operator, and reasonably cooperate in the transfer of day-to-day management of the Facility to the designee of Operator;

(b) To the extent Consultant is a party thereto, assign, transfer, or convey to such person or persons all service contracts and personal property relating to or used in the operation and maintenance of the Facility, except any personal property which was paid for and is owned by Consultant; and

(c) Make itself available at reasonable times, for a period of sixty (60) days after such expiration or termination, to consult with and advise Operator or such other person or persons regarding the operation and maintenance of the Facility. Consultant shall commit to making itself available for twenty (20) hours per week during the first thirty (30) days of such sixty (60) day period and ten (10) hours per week during the second thirty (30) days of such sixty (60) day period.

3.6 Notification of Breach Events. Consultant agrees to give immediate notice to Operator of any events listed under Sections 3.2(b)(i), (iii) or (iv), and Operator agrees to give immediate notice to Consultant of any events listed under Sections 3.3(b)(i) or (iii).

ARTICLE 4 **REPRESENTATIONS AND WARRANTIES**

4.1 Representations and Warranties of Operator. Operator makes the following representations and warranties which are material representations and warranties and upon which Consultant has relied as inducement to enter into this Agreement:

(a) This Agreement has been duly authorized and constitutes a valid and binding obligation of Operator, enforceable against Operator in accordance with its terms (except to the extent enforceability is limited by applicable bankruptcy, reorganization, insolvency, receivership or other similar laws and equitable principles relating to creditors' rights), and neither the execution and delivery of this Agreement nor the consummation of the transactions contemplated hereby nor compliance with any of the provisions hereof will:

(i) conflict with, or result in, a breach of the organizational documents, operating agreements or other governing documents of any of Operator;

(ii) violate any Applicable Law; or

(iii) violate or conflict with or constitute a default under (or give rise to any right of termination, cancellation or acceleration under) the terms or conditions or provisions of any note, instrument, bond, lease, mortgage, obligation, agreement, understanding, arrangement or restriction of any kind to which Operator is a party or by which Operator or any of its respective assets or properties may be bound.

(b) Operator is a limited liability company validly existing and in good standing under the laws of its state of formation, and has all requisite power and authority to carry on its business as now being conducted and as contemplated by this Agreement, to operate its Facility (in the case of Operator) as now being operated and as contemplated by this Agreement, to enter into this Agreement and consummate the transactions contemplated hereby, and to perform its

obligations hereunder. Operator is duly licensed or qualified to do business and is in good standing in each jurisdiction in which the properties owned or leased by it or the operation of its business as currently conducted makes such licensing or qualification necessary.

(c) The Facility has all material Licenses required by Applicable Law for the operation of the Facility for its Primary Intended Use, all of which Licenses are held by Operator and are in full force and effect.

(d) During the Term, Operator agrees to maintain at the Facility in full force and effect adequate policies of the following insurance: malpractice or professional liability, EPLI and general liability, with coverage of at least One Million Dollars (\$1,000,000.00) per incident, and Three Million Dollars (\$3,000,000.00) in the aggregate; all risk property coverage in sufficient amounts to cover the property of such Party; and workers compensation of One Million Dollars (\$1,000,000.00) per incident. Facility shall name Consultant as an additional insured on each of its insurance policies. On or before the Effective Date, Facility shall provide Consultant with certificates of insurance evidencing the insurance required to be maintained under this Agreement.

4.2 Representations and Warranties of Consultant. Consultant makes the additional representations and warranties set forth in this Section, which are material representations and warranties and upon which Operator have relied as inducements to enter into this Agreement.

(a) This Agreement constitutes the valid and binding obligation of Consultant, enforceable against Consultant in accordance with its terms (except to the extent enforceability is limited by applicable bankruptcy, reorganization, insolvency, receivership or other similar laws and equitable principles relating to creditors' rights), and neither the execution and delivery of the Agreement nor the consummation of the transactions contemplated hereby nor compliance with any of the provisions hereof will:

(i) conflict with, or result in, a breach of the organizational documents, operating agreement or other governing documents of Consultant; or

(ii) violate or conflict with or constitute a default under (or give rise to any right of termination, cancellation or acceleration under) the terms or conditions or provisions of any note, instrument, bond, lease, mortgage, obligation, agreement, understanding, arrangement or restriction of any kind to which Consultant is a party or by which Consultant or its assets or properties may be bound.

(b) Consultant certifies that it has checked the List of Excluded Individuals and Entities maintained by the Department of Health and Human Services Office of Inspector General and also the list maintained by the General Services Administration and neither it, nor any of its employees, partners, officers, members, directors or shareholder, are barred, suspended or terminated from participation in either the Medicaid Program, the Medicare Program or any other federally funded healthcare program.

(c) Consultant is a limited liability company validly existing and in good standing under the laws of the State of Vermont and has all requisite limited liability company power and authority to enter into this Agreement and consummate the transactions contemplated hereby, and to perform its obligations hereunder.

(d) During the Term, Consultant agrees (i) to carry and maintain in full force and effect, at its own expense, insurance related to the services it provides under this Agreement against such risks including, without limitation, professional liability insurance (the “**Consultant Insurance**”) policies, and for such amounts as are customarily insured against by a consultant of a similarly sized skilled nursing facility; and (ii) to pay, as the same become due and payable, all premiums in respect thereto.

(e) Within seven (7) days after signing this Agreement, Consultant will deliver to Operator true and correct copies of the insurance binders for Consultant Insurance naming Operator as an additional insured. Consultant agrees to use commercially reasonable efforts to cause Consultant Insurance to apply to all periods from and after the Effective Date, and Consultant will notify Operator promptly in writing if Consultant is unable to secure such retroactive coverage.

(f) From and after the date hereof, Consultant shall (i) maintain Consultant Insurance policies for so long as this Agreement remains in effect, and (ii) provide Operator thirty (30) days’ prior written notice of any suspension, cancellation, termination, modification, non-renewal or lapse or material change of coverage of such policies for so long as this Agreement remains in effect.

ARTICLE 5

INDEMNIFICATION

5.1 **Indemnification by Consultant.** Consultant shall indemnify and hold harmless Operator and all of its members, managers, officers, directors, affiliates, employees, agents, attorneys, accountants, successors and permitted assigns (each, an “**Operator Indemnified Party**”) from and against any and all liabilities, losses, damages, claims, demands, costs or expenses (including reasonable attorneys’ fees) (“**Claims**”) to the extent arising from, or in connection with, directly or indirectly, the material breach of Consultant’s representations, warranties, covenants and obligations hereunder, Consultant’s failure to obtain Operator’s approval prior to terminating or imposing any other disciplinary action on any Facility Employee, the material breach of Consultant’s other obligations hereunder or the willful or negligent acts or omissions of Consultant or its agents or employees. Operator Indemnified Parties shall give Consultant timely notice in writing of any Claim or Claims asserted under this Section or third-party actions instituted against Operator giving rise to such Claim, and shall give Consultant the opportunity to defend the same at its own expense; *provided, however*, that the failure to give such prompt written notice shall not relieve Consultant from its indemnification obligations under this Section, except and only to the extent that Consultant forfeits rights or defenses by reason of such failure.

5.2 **Indemnification by Operator.** Operator shall indemnify and hold harmless Consultant and all of its members, managers, officers, directors, affiliates, employees, agents, attorneys, accountants, successors and permitted assigns (each, a “**Consultant Indemnified Party**”) from and against any and all Claims to the extent arising from, or in connection with, directly or indirectly, the material breach of Operator’s representations, warranties, covenants and obligations hereunder, the operation of the Facility, the Back-Office Services, or the willful or negligent acts or omissions of Operator or its agents or employees (except to the extent arising from, or in connection with, willful or negligent acts or omissions of Consultant or its agents or

employees). Consultant Indemnified Parties shall give Operator timely notice in writing of any Claim or Claims asserted under this Section or third-party actions instituted against Consultant giving rise to such Claim, and shall give Operator the opportunity to defend the same at its own expense; *provided, however*, that the failure to give such prompt written notice shall not relieve Operator from its indemnification obligations under this Section, except and only to the extent that Operator forfeits rights or defenses by reason of such failure.

5.3 Integration with Operations Transfer Agreement. Notwithstanding anything else in this Agreement or in the Operations Transfer Agreement, for matters related to the period during which the Facility is being managed by Consultant before the Effective Time set forth in the Operations Transfer Agreement, Operator shall not be required to indemnify and defend Transferee (as defined under the Operations Transfer Agreement) from obligations in the Operations Transfer Agreement if Operator is entitled to indemnity under this Agreement for such obligations.

ARTICLE 6

MISCELLANEOUS

6.1 Additional Covenants. The Parties hereby make the additional covenants set forth in this Section, which are material covenants and upon which each relies as an inducement to enter into this Agreement:

(a) Operator, Operator's Representative, and Consultant will cooperate with each other in every reasonable respect and will furnish the other Party with all information in its possession as may be reasonably required by the other Party for the performance of its obligations hereunder and will permit the other Party to examine and copy any data in its possession or control affecting the operation of the Facility.

(b) Operator acknowledges that Consultant retains all ownership and other rights in all proprietary systems, manuals, materials and other information, in whatever form, unless otherwise indicated herein, developed by Consultant ("**Consultant Proprietary Information**"). Consultant acknowledges that Operator retains all ownership and other rights in all policy and procedure manuals and operating manuals necessary for survey purposes, and the marketing, sales and promotional kits and materials of Operator with respect to the Facility ("**Operator Proprietary Information**"). Nothing contained in this Agreement shall be construed as a license or transfer of such Consultant Proprietary Information or Operator Proprietary Information, as the case may be, either during the term of this Agreement or thereafter.

(c) Except as specifically provided in this Agreement, Operator or Consultant, as the case may be, shall cause to be executed and delivered to the other Party all such other instruments and shall take or cause to be taken such further or other action as may reasonably and in good faith be deemed by the other Party to be necessary or desirable in order to further assure the performance by Operator or Consultant, as the case may be, of any of their respective obligations under this Agreement.

6.2 Operator Approvals. Whenever Operator's or Operator's Representative's approval is required hereunder or Operator or Operator's Representative is requested to approve a matter, such approval shall be delivered in writing. All matters that are subject to the prior

approval of Operator under this Agreement will be submitted by Consultant by providing written notice to Operator's Representative in accordance with Section 6.6 that it requests such approval, specifying in the notice the matter as to which the approval is requested and providing reasonable detail about the matter.

6.3 Operator's and Consultant's Representative.

(a) Operator does hereby appoint Christopher Consalus as Operator's true and lawful attorney-in-fact and agent ("**Operator's Representative**"), to act solely and exclusively on behalf of Operator with respect to the matters specified in this Agreement. Operator's Representative shall have full power and authority to take any and all actions and make any and all decisions required or permitted to be taken or made by Operator under this Agreement including, without limitation, settling any Claim by Consultant against Operator, instituting, pursuing, settling and waiving any Claim by Operator against Consultant, and executing any documents on behalf of Operator. In the event of the removal by Operator of, or the death or disability of Christopher Consalus, Operator shall immediately appoint, in writing, a new Operator's Representative.

(b) All actions taken by Operator's Representative shall be binding upon Operator, its successors, heirs, representatives and assigns as if expressly confirmed and ratified in writing by each of them. All actions required or permitted under this Agreement by Operator, and all notices to be given to Operator hereunder shall be effective if so taken or given by or to Operator's Representative, and Consultant shall be entitled to rely thereon. Any indemnification or other Claim of Operator against Consultant under this Agreement may be brought exclusively by Operator's Representative on behalf of Operator and Operator hereby waives the right to bring any such Claim on its own behalf.

(c) Consultant does hereby appoint Isaac Rubin as such Consultant's true and lawful attorney-in-fact and agent ("**Consultant's Representative**"), to act solely and exclusively on behalf of such Consultant with respect to the matters specified in this Agreement. Consultant's Representative shall have full power and authority to take any and all actions and make any and all decisions required or permitted to be taken or made by Consultant under this Agreement including, without limitation, settling any Claim by Operator against Consultant, instituting, pursuing, settling and waiving any Claim by Consultant against Operator, and executing any documents on behalf of Consultant. In the event of the removal by Consultant of, or the death or disability of Isaac Rubin, Consultant shall immediately appoint, in writing, a new Consultant's Representative.

(d) All actions taken by such Consultant's Representative shall be binding upon Consultant, its successors, heirs, representatives and assigns as if expressly confirmed and ratified in writing by each of them. All actions required or permitted under this Agreement by Consultant, and all notices to be given to Consultant hereunder shall be effective if so taken or given by or to Consultant's Representative, and Operator shall be entitled to rely thereon. Any indemnification or other Claim of Consultant against Operator under this Agreement may be brought exclusively by Consultant's Representative on behalf of Consultant and Consultant hereby waives the right to bring any such Claim on its own behalf.

6.4 Relationship of Parties. Nothing contained herein shall be deemed or construed to

create a partnership, joint venture, employment relationship or otherwise create any liability for one Party with respect to indebtedness, liabilities or obligations of the other Party except as otherwise may be expressly set forth herein. Consultant is and shall at all times remain an independent contractor.

6.5 Use of Facility. Consultant shall consult for the Facility solely for its Primary Intended Use and for all activities in connection therewith which are customary and usual to such a facility.

6.6 Notices. Subject to the limitation set forth in Section 6.3(b), all notices, requests and demands to be made hereunder to the Parties shall be in writing and shall be effective as follows:

(a) if transmitted by hand delivery, on the business day delivered or intended for delivery to the addressee;

(b) if transmitted by reputable overnight courier service, then on the business day following the business day of transmission to such courier service;

(c) if transmitted by postage pre-paid United States mail, on the third business day following such transmission to the United States mail; and

(d) if transmitted by electronic mail or other means of electronic transmission (with confirmation of transmission), on the business day of transmission, if transmitted before 4:30 p.m. (ET). Any such transmission shall be effective if in writing and addressed as follows:

To Operator, addressed to:

Kindred Healthcare, Inc.
680 South Fourth Street
Louisville, Kentucky 40202
Attn: Joseph L. Landenwich, General Counsel
Attn: Douglas Curnutte, Senior Vice President,
Corporate Development

With a copy to (which shall not constitute notice):

Polsinelli PC
401 Commerce Street, Suite 900
Nashville, Tennessee 37219
Attn: Bobby Guy, Esq.

To Consultant, addressed to:

Birchwood Operations LLC
c/o Ari Erlichman
101 Lawrence Avenue
Lawrence New York 11559
arierlichman@gmail.com

With a copy to (which shall not constitute notice):

Shireen T. Hart
Primmer Piper Eggleston & Cramer PC
shart@primmer.com

or to such other address or to such other person as may be designated by at least ten (10) days prior written notice given from time to time during the term hereof by one Party to the other. Rejection or refusal by the addressee to accept, or the inability of the courier service or the United States Postal Service to deliver because of change of address of which no notice was given, shall be deemed to be receipt of the notice sent.

6.7 Entire Agreement; Amendments. This Agreement contains the entire agreement among the Parties hereto with respect to the subject matter; and no prior oral or written, and no contemporaneous oral representations or agreements among the Parties with respect to the subject matter of this Agreement shall be of force and effect. Any additions, amendments or modifications to this Agreement shall be of no force and effect unless in writing and signed by Operator and Consultant.

6.8 Access to Books, Records and Documents.

(a) Until the expiration of six (6) years after the furnishing of services pursuant to this Agreement, Consultant shall in accordance with 42 CFR 420.302, make available, upon written request, to the Secretary of Health and Human Services, or upon request, to the Comptroller General of the United States, or any of their duly authorized representatives, this Agreement, and all books, documents and records of Consultant that are necessary to verify the nature and extent of the costs of any services furnished pursuant to this Agreement for which payment may be made under the Medicare program.

6.9 Assignment. No Party shall have the right to assign its rights and obligations under this Agreement without the express written consent of the other Party in its sole discretion. Upon any such assignment, this Agreement shall be binding upon and inure to the benefit of such assignee and the non-assigning Party. This Agreement shall be binding upon and inure to the benefit of the Parties hereto, and their permitted successors and assigns, and is for the sole benefit of the Parties and their permitted successor and assigns, and no third party shall have rights hereunder.

6.10 Anti-Fraud and Abuse. The Parties expressly agree that nothing contained in this Agreement shall require any Party, or its respective agents and employees, to refer any patients to, or order any goods or services from, any other Party. Notwithstanding any unanticipated effect of any provision of this Agreement, neither of the Parties will knowingly or intentionally conduct itself in such a manner as to violate the prohibitions against fraud and abuse in connection with the Medicare and Medicaid Programs.

6.11 Compliance with Laws. Each of the Parties agrees to abide by all applicable federal and state laws and regulations including, but not limited to, Title VI and Title VII of the Civil Rights Act; Section 504 of the Rehabilitation Act of 1983. No person shall be discriminated

against or denied the full services of any provider or any other benefit under this Agreement on the basis of race, color, age, sex, handicap, national origin, or religion.

6.12 Captions and Headings. The captions and headings throughout this Agreement are for convenience and reference only and the words contained therein shall in no way be held or deemed to define, limit, describe, explain, modify, amplify or add to the interpretation, construction or meaning of any provision of or scope or intent of this Agreement nor in any way affect this Agreement.

6.13 Waivers. No Party shall be deemed to have waived any rights provided to such Party under this Agreement without a written statement by such Party indicating that such Party was aware of such rights and intended to waive such rights. No waiver of any right by a Party or failure to exercise any right of a Party with respect to any occurrences or events shall be deemed a waiver of such Party's right with respect to any other occurrence or event or with respect to a later happening of the same occurrence or event.

6.14 Severability. If any provision of this Agreement or the application hereof to any person or circumstance shall be determined by any court of competent jurisdiction to be invalid or unenforceable for any reason, then such determination shall not affect the remainder of this Agreement or the application of such provision to any other persons or circumstances.

6.15 Authority and Responsibility. Each person signing this Agreement on behalf of a Party hereto represents that he has the authority to do so.

6.16 Governing Law. This Agreement shall be construed in accordance with and governed by the substantive laws of the State of Kentucky.

6.17 Dispute Resolution. Any dispute arising out of or relating to this Agreement shall be finally determined by arbitration in Louisville, Kentucky in accordance with the commercial arbitration rules of the American Arbitration Association by a single neutral arbitrator with no direct or indirect relationship to either Party. In such arbitration, the arbitrator shall (i) agree to treat all evidence as confidential; (ii) have no authority to amend or modify any of the terms of this Agreement; and (iii) have ten (10) business days from the closing statements or submission of post-hearing briefs by the Parties to render his or her decision. The results of any such arbitration shall be final and binding upon the Parties hereto, and any Party may enforce any arbitration award in any court of competent jurisdiction. The arbitrator will have the authority to award costs and expenses, including reasonable attorneys' fees, arising out of such arbitration proceedings. Notwithstanding the foregoing, each Party shall have the right to seek or obtain equitable relief including, without limitation, specific performance, from a court of competent jurisdiction.

6.18 HIPAA. As required by Applicable Law, the Parties shall execute a Business Associate Agreement in order to comply with the requirements of the Health Insurance Portability and Accountability Act ("HIPAA") Privacy and Security Rules.

6.19 Confidentiality. Each Party and its directors, officers, employees and agents shall not disclose to any third party the matters set forth in this Agreement without the prior written consent of the other Party. Without limiting the generality of the foregoing, Consultant will be permitted to notify Facility Employees, Back-Office Staff, residents, referral sources and the Vermont Division of Licensing and Protection using such form of notice as approved by

Operator's Representative in his or her reasonable discretion. Notwithstanding the foregoing, the Parties may (i) disclose the existence and general nature (but not the substance) of this Agreement to third parties provided that such disclosure is made only on a "need to know" basis and then with prompt notice to the other Party (in each case before disclosure to the extent practical), and (ii) file this Agreement with the licensing department in the state where the Facility is located to the extent required by law or necessary for approval hereof.

[Signatures appear on next page]

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first above written.

CONSULTANT:

Birchwood Operations LLC

By: 

Name: Ari Erlichman

Title: Owner

OPERATOR:

Kindred Nursing Centers East, L.L.C.

By: _____

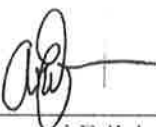
Name: _____

Title: _____

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first above written.


CONSULTANT:

Birchwood Operations LLC

By: 
Name: Ari Erlichman
Title: Owner

OPERATOR:

Kindred Nursing Centers East, L.L.C.

By: 
Name: Douglas L. Curnutte
Title: Senior Vice President,
Corporate Development

[Signature Page to Birchwood Terrace Consulting Agreement]

SCHEDULE A

ADMINISTRATIVE AND BACK-OFFICE SERVICES

Kindred Healthcare Operating, Inc. currently provides all management, back office and administrative services to the Facility. As of the Effective Date, Kindred Healthcare Operating, Inc. shall continue to provide to the Facility all other back office and administrative services which it currently provides to the Facility. These services include but are not limited to:

Accounting and Accounts Payable - Including processing of all expense and capital items, related payments, preparation of financial statements and audits thereof and provide to Facility' consultants the information necessary to prepare the Facility' cost reports.

Billing and Accounts Receivable - Processing of all resident bills and related collection activities.

Payroll and Employee Benefits - Processing of all payroll, payroll tax and employee benefit transactions and all related Human Resource activities.

Information Technology - Provide all Information Technology services currently provided to the Facility.

Cash Management - Establish and maintain all required bank accounts and properly conduct and account for all appropriate cash transactions, including Resident Trust Account activities.

Income Taxes - Processing of any required income tax related transactions or informational activities including arranging for the preparation of all required tax returns.

Purchasing - Place all necessary orders with vendors in accordance with current practices.

Reimbursement – Management of all third-party contract accounting and reimbursement by Medicare, Medicaid, and Managed Care programs, including preparation and filing of all related cost reports.

Insurance – Without prejudice to Consultant's insurance obligations, continue to maintain and administer all insurance coverages applicable to Operator including, without limitation, the management and administration of all such Claims.